

OGC 77-2485

13 April 1977

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w/ 15 Apr  
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MEMORANDUM FOR : Deputy to the DCI for the Intelligence Community  
STATINTL  
FROM :   
Associate General Counsel  
SUBJECT : Legal Effect of House Appropriations Committee  
"Instructions"

1. The attached memorandum by  considers the questions you posed concerning the legal effect of certain actions taken by the House Appropriations Committee, specifically the Committee's instructions, in the course of the recent reprogramming exercise, which apparently would terminate two named programs, and the Committee's various instructions concerning the organization and operation of the IC Staff.  concludes that the Committee's actions do not establish legal requirements and that they are without legal effect. We intend also a second paper addressing the specifics of these two particular reprogramming or termination decisions.

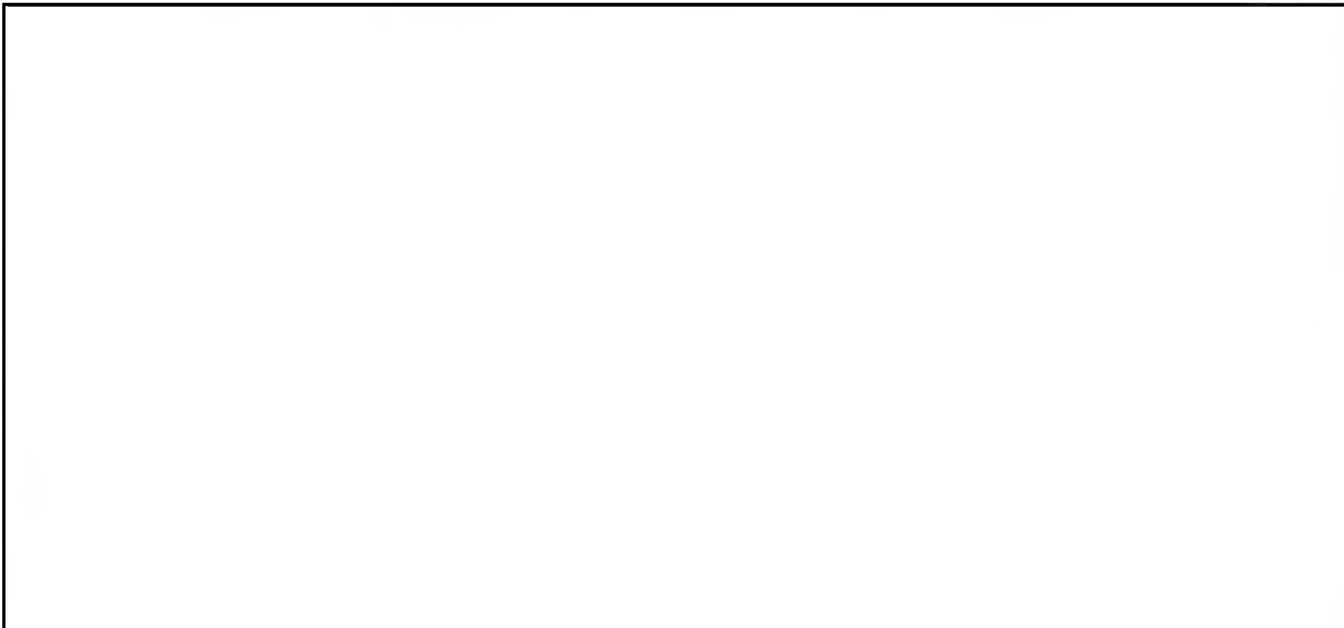
2. As the Committee's instructions concerning the organization and operation of the IC Staff, including the requirement for a detailed plan for the establishment of a permanent IC cadre,  points out that the separation of powers doctrine in the Constitution precludes any legally effective instruction on the part of the Committee. Congress of course has a number of powers under the Constitution, primarily those of enacting legislation, investigating, declaring war, etc. But the "executive power shall be vested in a President of the United States of America." We find nothing in the Constitution or statutes which would require executive branch agencies to comply with instructions contained in conference reports or in other legislative pronouncements (other than laws) and directed to the executive branch agencies. Further, it would appear that any such instructions would amount to a Congressional usurpation of executive branch authority.

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such officials ought to be able to rely upon them. Therefore, in considering the question as to which prerogatives in regard to reprogramming actions are held by officials in the executive agencies and which have been reserved by the Congress, it is advisable to look first to the terms of the guidelines agreed upon.

8. Where there is no proposed reprogramming action, but rather a directive from the Congress not to expend funds as originally appropriated, the question would seem to be one of whether the original appropriation was effectively repealed. The Congress has the power to repeal an appropriation statute just like any other statute.<sup>7</sup> A statute may be repealed expressly, or by implication,<sup>8</sup> but in either case legislative action is required. A resolution, or a bill which never becomes a law, cannot repeal a statute.<sup>9</sup> A fortiori, it would seem that comments by individual members of the legislature to the effect that moneys should not be expended as appropriated have no legal effect.

9. Under the United States Code there are provisions directed both at overobligation of appropriations and underobligation of appropriations. The former situation is dealt with at 31 USC 665, the Anti-Deficiency Act, which prohibits the obligation of funds in excess of available appropriations. The latter situation is dealt with at 31 USC 1401 et seq., the Impoundment Control Act of 1974.

10. Section 1401 defines deferral of budget authority to include the withholding or delaying of obligation or expenditure of budget authority provided for projects or activities. Section 1403 provides that when any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House and the Senate a special message setting forth all the facts, circumstances and considerations relating to the proposed deferral. Section 1402 provides for a similar report whenever the President determines that any budget authority will not be required to carry out the full objectives of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons. Under section 1403, the proposed deferral is ineffective if either House passes a resolution disapproving the deferral. Under 1402, the proposed rescission is ineffective if the Congress does not complete action on a rescission bill within 45 days. Section 1406 makes both sections 1402 and 1403

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<sup>7</sup> 82 C.J.S. Statutes §279.

<sup>8</sup> *id.*, §280.

<sup>9</sup> *id.*

11. Quite clearly, therefore, the decision not to expend funds as appropriated is a serious one. While the legislative history of the Impoundment Control Act indicates that it is aimed primarily at executive branch action, it must be noted that section 1403 addresses itself to "any officer or employee of the United States." In any event, any rescission or deferral proposal requires action on the part of the executive branch for its implementation and would therefore appear to come within the Act. While presumably the Congress and executive can jointly agree not to expend certain funds without fulfilling all the procedural requirements of the Impoundment Control Act, unilateral termination of a program is not to be lightly regarded. In the situation where the Congress is suggesting that a program or project be terminated, it is suggested that some formal embodiment of the agreement to terminate be sought.

12. In the absence of agreement to terminate, it would seem as a matter of strict legalities that under existing law the Congress has the option to repeal the appropriation and the executive has the option to use the procedures of the Impoundment Control Act. However, inasmuch as both processes are cumbersome, the realities of interdependence weigh in favor of reaching an accommodation short of falling back to strict legalities. Nonetheless, as previously indicated, it would appear advisable to seek a clear and authoritative expression of Congressional intent that moneys not be expended as appropriated before terminating a project for which they were specifically appropriated.



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